

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, :

v. : CRIMINAL NO.
3:02CR88(AHN)

WILLIAM HORTY, I.M. ESTRADA & CO. :
SETTER SYSTEMS, INC.

RULING ON MOTION TO DISMISS

Presently pending before the court is defendant William Horthy's ("Horthy's") motion to dismiss the indictment which charges three counts of wire fraud. For the reasons set forth below, the motion [doc. # 23] is DENIED.

BACKGROUND

On March 27, 2002, Horthy was charged in an indictment with three counts of wire fraud in violation of 18 U.S.C. 1343. The indictment also charged I.M. Estrada & Co., Inc. ("IMEC") and Setter Systems, Inc. with fraudulent conduct. All of the counts relate to an alleged scheme that began in or about November 1998, whereby Horthy who was the executive Vice-President of IMEC and/or the President of Setter Systems solicited potential customers and promised to provide them with printing equipment in exchange for monetary payment. According to the indictment, Horthy demanded a substantial

deposit from his customers before agreeing to deliver the equipment. However, Horthy either had no such equipment for sale, or any equipment that he did have was essentially non-functional.

With respect to the use of the wires, the indictment alleges that, "having devised a scheme and artifice to defraud for the purpose of executing and attempting to execute" the scheme and artifice to defraud, the defendants "did knowingly transmit and cause to be transmitted by means of wire communication in interstate commerce" two documents: (1) a facsimile to SFC Graphics located in Ohio; and (2) a facsimile to Priority Press in Connecticut. The indictment also charges that Horthy made a telephone call in furtherance of the scheme to an individual in Michigan.

Although the indictment only charges three instances of fraudulent conduct, the government has submitted a proffer that outlines evidence of fifteen additional transactions in which victims were defrauded as part of Horthy's overall scheme.¹

DISCUSSION

¹ At trial, the government will argue that the evidence of the fifteen additional fraudulent transactions are admissible under Fed. R. Evid. 404(b) to show motive, intent to defraud, preparation, plan, identity, and absence of mistake or accident. See Fed. R. Evid. 404(b).

A criminal indictment is governed by F. R. Crim. P. 7(c) which only requires an indictment to contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." Id. The validity of an indictment is tested by its allegations, not by whether the government can prove its case. See Costello v. United States, 350 U.S. 359, 363 (1956).

Here, Horthy does not challenge the legal sufficiency of the indictment. Rather, Horthy claims that § 1343, the wire fraud statute, is unconstitutionally vague as applied to the charged conduct in the indictment. The court disagrees. A criminal statute is determined not to be unconstitutionally vague if the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (collecting cases). Therefore, when a statute or ordinance is challenged on vagueness grounds, a court must determine whether it provides both fair notice to the public that certain conduct is prohibited and minimal guidelines to aid law enforcement officials in the enforcement of that prohibition. See id. Because this case does not involve a First Amendment

challenge, the statute must be evaluated "in light of the facts of the case and on an as-applied basis." United States v. Whittaker, 999 F.2d 38, 42 (2d Cir. 1993).

Horty relies on United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) to argue that the wire fraud statute is unconstitutionally vague. Specifically, Horty claims that Handakas precludes the government from charging wire fraud when the basis of the indictment is a breach of contract claim. Horty's argument misses the mark. In Handakas, the Court of Appeals for the Second Circuit found that the phrase "honest services" pursuant to § 1346 was too vague when applied to a conviction in which the only basis for the alleged intangible right of honest services was based on a contract. Id. at 107.

Here, the government does not allege a § 1346 theft of honest services/wire fraud. Rather the government charges that Horty devised a scheme to defraud his customers of money by promising to sell them equipment that he did not have or that was essentially non-functional. Because Horty makes a vagueness challenge to § 1343, not § 1346, the holding in Handakas is not applicable.

Moreover, the relevant inquiry is not whether the basis for the alleged criminal conduct involves a breach of

contract, but whether the statute is so vague that a person could not reasonably understand that the contemplated conduct, as charged in the indictment, is proscribed by the statute. In making this determination, the statute is to be examined in light of the charged conduct. Here, the indictment charges that Horthy acted willfully and with intent to defraud his customers of their money. Despite accepting substantial payments and agreeing to provide professional printing equipment, Horthy either failed to deliver any equipment or delivered non-functional equipment and did not refund any of his customers' deposits. See United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932) ("Promises, if made without intent to perform, have for long been regarded as frauds in such prosecutions."). Where, as here, an ordinary person would understand that intentionally soliciting customers and promising them equipment in exchange for monetary payment and then not delivering the equipment or delivering non-functional equipment and keeping the money is prohibited conduct, the language of the statute does not encourage arbitrary enforcement.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss [doc. # 23] is DENIED.

SO ORDERED this day of January, 2003, at
Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge